

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CARA LESLIE ALEXANDER,	)	
et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 96-2123
	)	97-1288
	)	(RCL)
FEDERAL BUREAU OF	)	
INVESTIGATION, et al.,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM AND ORDER

This matter comes before the court on Defendants' Motion to Quash Plaintiffs' Subpoena for the Deposition of Government Counsel and for Expedited Consideration. Upon consideration of defendants' motion, plaintiffs' opposition, and defendants' reply, the court will DENY defendants' motion, as discussed and ordered below.

I. Background

The allegations in this case arise from what has become popularly known as "Filegate." Plaintiffs allege that defendant FBI and defendant Executive Office of the President (EOP) willfully and intentionally violated plaintiffs' rights under the Privacy Act by improperly obtaining and releasing their FBI file information. Moreover, plaintiffs allege that Bernard Nussbaum, Craig Livingstone, and Anthony Marceca committed the common-law tort of

invasion of privacy by willfully and intentionally obtaining plaintiffs' FBI files for improper political purposes.

On February 18, 1997, pursuant to the Westfall Act, 28 U.S.C. § 2679(d)(1), the United States, through then-Deputy Assistant Attorney General Eva Plaza, filed a notice of substitution of itself for defendants Nussbaum, Livingstone, and Marceca. Plaintiffs challenged the substitution and asked the court to find that these individual defendants were acting outside the scope of their employment. The court declined to adopt plaintiffs' conclusion, rejected the United States' contention that "because the defendants were political appointees, it was within the scope of their employment to gather . . . FBI files for partisan political purposes," found that plaintiffs had raised a genuine issue of material fact as to whether the individual defendants were acting within the scope of their employment, and held that plaintiffs were entitled to some discovery on this issue, along with the issue of class certification. Alexander v. FBI, Civ. No. 96-2123, Memorandum Op. at 18 (D.D.C. June 12, 1997).

A recent ruling of this court has set a date-certain deadline on this initial phase of discovery. On April 21, 1999, the court held that plaintiffs are allowed only five further depositions (excluding the depositions of Betsy Pond and Deborah Gorham) on the issues of class certification and scope of employment and that all discovery on these issues must end by June 12, 1999. See Alexander v. FBI, Civ. No. 96-2123, Memorandum and Opinion at 7 (D.D.C. Apr.

21, 1999). On June 7, 1999, plaintiffs served a subpoena duces tecum and Notice of Rule 30(b)(6) Deposition on the Department of Justice. Plaintiffs' Notice asks that the Department of Justice designate the appropriate person or persons to testify about "all matters which refer to, or relate to, or form the underlying factual basis" for the United States' certification. Plaintiffs' Notice of Rule 30(b)(6) Designation at 2. The deposition was noticed for June 11, 1999, at 8:00 a.m. On June 8, 1999, defendants moved to quash plaintiffs' subpoena on the basis of relevance, attorney-client privilege, attorney work-product privilege, and deliberative process privilege. Defendants have not moved for a protective order. On June 10, 1999, the court temporarily stayed the deposition pending further order. For the reasons stated below, the court will deny defendants' motion but will significantly limit plaintiffs' scope of inquiry to avoid clearly privileged testimony and documents from being released.

## II. Analysis

### A. Relevance

Plaintiffs seek to discover the facts underlying the Deputy Assistant Attorney General's certification. See Plaintiffs' Opposition at 3-4. Defendants contend that, based on a lack of relevance, plaintiffs are not entitled to discover the facts underlying that certification, even though they bear directly upon whether the individual defendants were acting within the scope of

their employment. According to defendants, these facts are made irrelevant by the de novo standard of review under which this court must analyze the Westfall Act certification and, consequently, the scope-of-employment issue. This argument is incorrect. These facts are relevant because of the de novo standard and the issues needed to be resolved in this case—e.g., whether the individual defendants were acting in the scope of their employment, notwithstanding the Deputy Assistant Attorney General's review of them, as described below.

Rule 26(b)(1) of the Federal Rules of Civil Procedure, which addresses the scope of discovery, states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). Clearly the Deputy Assistant Attorney General's certification is a relevant matter, since it affects the determination of whether the individual defendants are proper defendants to this lawsuit. See 28 U.S.C. § 2679. The case law in this circuit is clear, and defendants agree, that the Westfall Act certification is not conclusive and that plaintiffs may challenge it. See Kimbro v. Velten, 30 F.3d 1501 (D.C. Cir. 1994). The court's review of the certification, if plaintiffs show a genuine issue of material fact,

is to take place under a de novo standard after an evidentiary hearing. Id. at 1509.

Contrary to defendants' reasoning, the facts plaintiffs seek—i.e., those bearing upon whether the individual defendants acted in the scope of their employment, including the identify of government employees with knowledge of relevant facts and documents containing similarly relevant information—are not made irrelevant by the de novo standard of review. Presumably the Deputy Assistant Attorney General and plaintiffs would generally have an interest in the same nucleus of facts as relevant to whether the individual defendants acted within the scope of their employment. It is exactly this set of facts that plaintiffs will need discovery of to present their arguments at any evidentiary hearing in this matter.<sup>1</sup> Therefore, because the facts plaintiffs seek—which hopefully underlie the Westfall Act certification and which bear directly upon whether the individual defendants should even be defendants in this case—are discoverable, defendants' contention to the contrary must be rejected. Put another way, plaintiffs are entitled to learn facts bearing upon whether the individual defendants acted within the scope of their employment, unless the release of this information would infringe upon privileged matter. Westfall Act certification, no matter what standard of review the court uses in

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<sup>1</sup>The court expresses no opinion at this time as to whether the controlling law requires an evidentiary hearing or whether written submissions will suffice.

reviewing it, does not alter the relevance of these facts. The de novo standard of review only bolsters the importance of these facts because of the lack of deference given to the certification.

The court agrees with defendants' relevance arguments, however, to the extent that plaintiffs seek to learn the process behind the Deputy Assistant Attorney General's certification, the adequacy of that determination, or the internal deliberations of the Department of Justice regarding the facts gathered. Plaintiffs' remedy for any shortcoming in those respects is through the presentation of the relevant facts described above directly to the court under a de novo standard, not through indirectly attacking the inadequate process or basis for the certification. See id. (noting that the Westfall Act certification should be given "no particular evidentiary weight" except to the extent that it is given "'prima facie' effect"). Thus, because the process used by the Deputy Assistant Attorney General is not relevant to any determination needed to be made by this court, and because the adequacy of the information available to the Deputy Assistant Attorney General is not in and of itself relevant given the de novo standard of review, plaintiffs may not rely upon these theories to justify discovery.<sup>2</sup>

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<sup>2</sup>Because the court holds that these specific matters are irrelevant, the court need not address defendants' claim that the internal deliberations of the Department of Justice are protected by the deliberative process privilege.

In conclusion, plaintiffs are entitled in terms of discovery to facts that bear upon whether the individual defendants acted within the scope of their employment because these facts directly pertain to the evidentiary determination needed to be made by this court as to the scope-of-employment issue. The adequacy of and process behind the Deputy Assistant Attorney General's certification do not fall within this discoverable category.

It is the court's perception that what is truly the gravamen of defendants' motion to strike is not the facts plaintiffs seek to discover. Rather, it is how and from whom plaintiffs seek to discover these facts to which defendants object. But this issue is not one of relevance; it is one of procedure and privilege. The court will now turn to that analysis.

## B. Procedure and Privileges

### 1. *Rule 30(b)(6)*

Every privilege argument that defendants assert rests upon the assumption that plaintiffs seek to depose opposing counsel in conjunction with the discovery of the relevant facts discussed above. One need look no further than the title of defendants' motion, "Motion to Quash Plaintiffs' Subpoena for the Deposition of Government Counsel," to appreciate defendants' reliance on this premise. As discussed in this section, defendants' assumption does not appear to be well founded, at least in the materials presented

to the court, and it certainly has not been proved. Accordingly, defendants' motion must be denied on this ground alone.<sup>3</sup>

Rule 30(b)(6) states that "[a] party may in the party's notice and in a subpoena name as the deponent a . . . governmental agency and describe with reasonable particularity the matters on which examination is requested." FED. R. CIV. P. 30(b)(6). Plaintiffs have done so in this instance, and defendants do not challenge the particularity of plaintiffs' description. "In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf. . . . The persons so designated shall testify as to matters known or reasonably available to the organization." Id.

Evidently defendants' position is that plaintiffs may not receive any testimony under their reasonably particular description, which the court has already held to seek discoverable matter, because defense counsel would be the only appropriate witnesses and several privilege doctrines, in their view, preclude all such testimony from being given. In their brief, defendants state that "[p]laintiffs seek, for all intents and purposes, to depose DOJ attorneys, who are counsel in this case, about their

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<sup>3</sup> As discussed in the next section, which deals with defendants' privilege arguments (assuming arguendo that the only person competent to be designated under plaintiffs' Rule 30(b)(6) notice is opposing counsel), defendants' assumption does not lead to the quashing of the deposition.

investigation and evaluation of the facts and circumstances underlying this action on which the Attorney General's scope certification is based." Defendants' Motion at 2. Defendants later reveal that the "persons most knowledgeable about the basis for the Attorney General's certification, whom DOJ would have to designate to testify on its behalf under Rule 30(b)(6), and whose notes and memoranda of that investigation would have to be produced, are the DOJ attorneys who conducted the inquiry on which the scope certification was based." Id. at 4. In a declaration attached to defendants' motion, defendants' counsel, James J. Gilligan, states that the "individuals who conducted the Department of Justice's internal scope-of-employment inquiry were myself, Elizabeth Shapiro, Allison Giles, and Timothy Garren, all Trial Attorneys in the Civil Division. All of these individuals are counsel for the government defendants responsible for the litigation of this case." Gilligan Decl. ¶ 3.

The court draws three conclusions from these circumstances. First, defendants have not submitted any support for the conclusion that defendants' counsel would be the only viable designation in response to plaintiffs' Rule 30(b)(6) notice. Gilligan's declaration states that Deputy Assistant Attorney General Plaza no longer works for the Department of Justice, yet Rule 30(b)(6) explicitly contemplates that persons not currently employed by a governmental agency but who "consent to testify on its behalf" may be designated if otherwise appropriate. FED. R. CIV. P. 30(b)(6).

That Plaza is no longer a DOJ employee is not determinative of her availability as a witness under the rule. Moreover, defendants have made no attempt (except conclusorily) to show why Plaza or her successor, after reasonable preparation to testify about matters reasonably known by the designating party, would be an inadequate Rule 30(b)(6) witness. See FED. R. CIV. P. 30(b)(6) (stating that "[t]he persons so designated shall testify as to matters known or reasonably available to the organization."); Protective Nat'l Ins. v. Commonwealth Ins., 137 F.R.D. 267, 277-78 (D. Neb. 1989) ("If [Rule 30(b)(6)] is to promote effective discovery regarding corporations the spokespersons must be informed. This means that: '[The corporation] must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the interrogator] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed by [the interrogator] as to the relevant subject matters.'" (quoting Mitsui & Co. v. Puerto Rico Water Resources Auth., 93 F.R.D. 62, 67 (D.P.R. 1981))). Because of the relevance of the facts plaintiffs seek, the court is not willing to blindly accept defendants' assumption that opposing counsel would be the only appropriate designees. Second, and setting aside the assumption (as the court must) that only government counsel would be appropriate witnesses, plaintiffs are entitled to this relevant testimony (to the extent it is not privileged, as discussed below). There is nothing defective in plaintiffs' Rule 30(b)(6) notice. Because plaintiffs

seek discoverable information and have properly noticed this Rule 30(b)(6) deposition, defendants "shall" designate an appropriate witness. FED. R. CIV. P. 30(b)(6). Third, assuming that government counsel handling this case are the only appropriate witnesses and further assuming (as the court holds below) that the testimony plaintiffs seek is not entirely privileged, then government counsel shall be designated as would any other witness. The testimony sought by plaintiffs under these assumptions, as limited below, would be unavailable from any other means, relevant, non-privileged, and crucial to the preparation of plaintiffs' challenge of the scope-of-employment certification. See Religious Technology Ctr. v. F.A.C.T. Net, Inc., 945 F. Supp. 1470, 1480 (D. Colo. 1996) (holding that these elements must be met if the deposition of opposing counsel is to be allowed). For these reasons, defendants' motion to quash will be denied.

## *2. Attorney-Client and Attorney Work-Product Privileges*

The court has already held that defendants' motion must be denied because they have not shown that defendants' counsel handling this case would be the only appropriate witness in response to plaintiffs' Rule 30(b)(6) notice and because plaintiffs are otherwise entitled to the relevant information that they seek, as limited above by the court. Since defendants may decide to designate their counsel, however, the court will address

defendants' privilege arguments as they apply at this time, since they have already been briefed and in the interest of preventing further delays. It should be noted that the court is addressing these privilege claims in terms of a wholesale quashing of plaintiffs' Rule 30(b)(6) notice, and the court's findings are not necessarily dispositive of every question that may be asked at the deposition. In other words, although the court will hold that neither the attorney-client nor attorney work-product privilege precludes the deposition of defense counsel on the relevant issues discussed above, as further limited by the court below, this is not to say that these privileges will not apply depending upon the questions asked at the deposition. For the purposes of quashing this deposition and as a general matter, however, the court holds that certain facts plaintiffs seek do not impinge upon these privileges.

Defendants contend that the Rule 30(b)(6) deposition must be quashed based upon the application of the attorney-client and attorney work-product privileges. Defendants argue that, as government counsel, they talked only with current and former government employees in connection with rendering legal advice to the Attorney General as to the Westfall Act certification. Defendants' Motion at 5. "Hence, counsel's mental impressions and recollections of those conversations are protected from disclosure by the attorney-client privilege." Id. Moreover, according to defendants, counsels' legal opinion, both written and non-written,

implicated by this subject matter would fall under the attorney work-product privilege as legal opinion generated in anticipation of litigation. The court agrees that counsels' mental impressions and the substance of their confidential communications are privileged—by either the attorney-client or attorney work-product privilege, depending upon the circumstances—but disagrees with defendants' arguments as to the identities of people and the documents pertaining to the investigation that were reviewed in connection with the Westfall Act certification, excluding documents containing legal advice or opinion generated in anticipation of the current litigation. Accordingly, the court rejects defendants' argument in these respects.

It is well settled that the attorney-client privilege applies to communications between an attorney and client but not to the facts underlying these communications. Upjohn, 449 U.S. 383, 395 (1981). The party seeking the application of the attorney-client privilege bears the burden of proving all of its elements. In re Bruce Lindsey, 158 F.3d 1263, 1270 (D.C. Cir. 1998). Like all privileges, the attorney-client privilege must be narrowly construed. See Mead Data Central, Inc. v. United States Dep't of the Air Force, 617 F.2d 854, 862 (D.C. Cir. 1977). The attorney work-product privilege, on the other hand, casts a wider but related net. Material prepared in anticipation of litigation may be discovered only upon a showing by the requesting party that it

has a substantial need for this material and that this information cannot be otherwise obtained.

Upjohn Co. v. United States, 449 U.S. 383 (1981), is instructive on the extent of the application of the attorney-client and attorney work-product privileges in the context of this case. As described above, the ultimate facts apparently sought by plaintiffs are discoverable unless privileged. The real question (under the assumption already mentioned) is whether plaintiffs should be able to elicit these facts from government counsel who are handling this case.

In Upjohn, the general counsel for defendant Upjohn was informed that one of its subsidiaries had made questionable payments to foreign governmental officials in order to secure government business. Id. at 386. Upjohn internally investigated this matter. In conducting this investigation, Upjohn's attorneys questioned foreign managers by questionnaire and had the responses returned to the general counsel. The general counsel and outside counsel conducted interviews of the recipients of the questionnaires, from which counsels' notes and memoranda were generated. Id. The Internal Revenue Service, in connection with an examination of the tax implications of these payments to the foreign officials, sought production of the questionnaires, the responses, the notes taken by counsel, and the legal memoranda generated as a result of the interviews. Id. at 388.

The Supreme Court held that certain materials sought by the IRS, which were generated in connection with Upjohn's counsels' interviews of Upjohn employees, were protected by the attorney-client and attorney work-product privileges. In so holding, the court noted that the government, as the party seeking discovery, "was free to question the employees" who had been interviewed by Upjohn's counsel.<sup>4</sup> Id. at 396. The Court noted that it probably would have been much more "convenient" for the IRS to obtain this same information efficiently by securing the materials directly from counsel, but went on to point out that "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." Id. This discussion of the application of the privileges nicely resolves the dispute currently before the court.

Plaintiffs are not entitled to borrow opposing counsel's "wits" to learn facts simply because those facts are ultimately discoverable. Assuming government counsel were deposed as to the substance of conversations with the interviewed employees, the testimony would undoubtedly be permeated by counsel's legal opinions. Plaintiffs are not entitled to this information because of the attorney-client and attorney work-product privileges. The attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving

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<sup>4</sup>The defendants in Upjohn had voluntarily provided the government with a list of witnesses. Id.

of information to the lawyer to enable him to gain sound and informed advice." Id. at 390. The court believes that, in the current context, the substance of conversations between government counsel and government employees would impinge upon the substance of such protected communications, thereby triggering the attorney-client privilege, along the way dragging in counsel's mental impressions in formulating the interview and in remembering what testimony he or she considered important, thereby triggering the attorney work-product privilege. Therefore, plaintiffs are not entitled to the substance of these conversations with government employees or materials generated originally by or for counsel in connection with the Westfall Act certification (as the latter would be material generated in anticipation of litigation).

However, this holding does not preclude discovery of all of the matter plaintiffs seek. As in Upjohn, plaintiffs are entitled to the identities of witnesses with knowledge of relevant facts. This information does not involve confidential communications and the identities, by themselves, do not reveal any legal opinion or strategy. The same can be said of documents that were relied upon in connection with the scope-of-employment determination-i.e., documents contemporaneous with the actions taken by the individual defendants that serve as the basis of the scope-of-employment determination, as opposed to documents generated as a result of any such investigation, which the court has already held to be privileged.

Subject to the limitations of privilege, "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495, 507 (1947). The court's ruling today excises the clearly privileged matters involved in plaintiffs Rule 30(b)(6) request but allows them an avenue to receive this discoverable information they legitimately seek.

### III. Conclusion

The court's ruling today is five-fold. First, defendants' motion to quash must be denied because they have not shown that, after reasonable preparation, government counsel handling this case would be the only appropriate designee under FED. R. CIV. P. 30(b)(6). Second, plaintiffs seek discoverable information insofar as they seek facts reasonably related to whether the individual defendants acted within the scope of their employment, regardless of defendants' Westfall Act certification involving these facts or the standard of review this court must apply in reviewing that certification. Third, plaintiffs may not discover the substance of communications between government counsel and the government employees interviewed by government counsel, based on the applicability of the attorney-client and attorney work-product privileges. Fourth, plaintiffs may not discover documents generated by or for government counsel as a result of government counsels' interviews of employees pertaining to the Westfall Act

certification, based on the applicability of the attorney-client and attorney work-product privileges. Fifth, and consequently, plaintiffs may discover from government counsel only the identities of those people with knowledge of relevant facts learned of by the government in connection with the Westfall Act certification, and contemporaneous documents received that may provide facts relied upon in connection with the certification.

For these reasons, the court HEREBY ORDERS that:

1. Defendants' Motion to Quash Plaintiffs' Subpoena for the Deposition of Government Counsel and for Expedited Consideration is DENIED.

2. In accordance with Rule 30(b)(6) of the Federal Rules of Civil Procedure, defendants shall produce documents responsive to and designate an appropriate person to testify about the matters described by plaintiffs in their subpoena duces tecum and notice of deposition, to the extent these matters have been deemed relevant and non-privileged by the court.

3. Plaintiffs are entitled to the identities of those people with knowledge of relevant facts learned of by the government in connection with the Westfall Act certification. Plaintiffs are also entitled to contemporaneous documents that may provide facts relied upon in connection with the certification.

4. Plaintiffs may not seek to discover by deposition of government counsel the substance of communications between opposing

counsel and the employees they interviewed in connection with the Westfall Act certification.

5. Plaintiffs may not discover documents generated by or for government counsel as a result of government counsels' interviews of employees pertaining to the Westfall Act certification.

SO ORDERED.

Date:

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Royce C. Lamberth  
United States District Court